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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT R. FREEMAN, ET AL.,
Petitioners,
v.
WILLIE EUGENE PITTS, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF PLAINTIFF-INTERVENORS SEEKING REVERSAL IN PART AND AFFIRMANCE IN PART

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I.

INTEREST OF AMICI

This *amicus curiae* brief is filed on behalf of eighteen black parents of primary and secondary school-age children enrolled in public schools within the DeKalb County school district. These parents intervened in the district court below as additional named representatives of the plaintiff class.[1] Intervention was sought and granted subsequent to the issuance by the Eleventh Circuit Court of Appeals of the opinion which formed the basis of this Court's writ of *certiorari*.[2] Given that the appellate court directed that more needed to be done by Petitioners to rectify the effects of their prior illegal segregation, these parents intervened to ensure that quality education was not sacrified or

[1] Throughout this Brief, these parents will be referred to as "Plaintiff-Intervenors."

[2] A copy of the district court order allowing intervention by these parents is attached to this Brief as Appendix "A".

overlooked by the Petitioners or Respondents in carrying out the Eleventh Circuit's mandate.

The parties have consented to the filing of this brief and their consent letters have been filed with the Clerk of this Court.

II. STATEMENT OF THE CASE

The present school desegregation case originated with a Complaint which was filed in the United States District Court for the Northern District of Georgia on July 5, 1968. The district court's initial desegregation Order, entered on June 12, 1969, directed the provision of "remedial educational programs which permit students attending or who have previously attended segregated schools to overcome past inadequacies in their education." (Pet. App. 32a).[3] This initial Order was thereafter modified and supplemented on several occasions.

On January 16, 1986, the DeKalb County School System ("DCSS") moved for an order releasing it from the jurisdiction of the district court and for a declaration that the DCSS had attained unitary status. The Court held a hearing on this motion on July 6-22, 1987.

On June 30, 1988, the district court denied the DCSS's motion. In reaching its decision, the district court evaluated six factors relevant to this determination as posited in *Green v. County School Bd.*, 391 U.S. 430 (1968). With respect to four of the categories enumerated in *Green* —

[3] References to particular pages of the appendices of the DeKalb County School Board's petition for a Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit shall hereinafter be identified by the phrase "Pet. App.", followed by reference to the particular page of the appendices being cited.

student assignment, transportation, extracurricular activities and facilities — the district court declined to impose additional duties on the DCSS. (Pet. App. 44a-48a, 59a, 71a-72a). With respect to two other *Green* factors — faculty and staff — the district court ordered the DCSS to file a report and present a plan sufficient to meet the dictates of *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969)(*en banc*)(requiring racial equality in the assignment of teachers and principals), *rev'd. per curiam on other grounds*, 396 U.S. 290, *cert. denied*, 396 U.S. 1032 (1970). (Pet. App. 57a-59a, 71a-72a).

The parties had additionally requested that the court consider a seventh factor — "quality of education" — in determining whether unitary status had been achieved. The district court granted this request, and this seventh factor was considered by the court, which observed as follows:

> The court agrees that quality of education should properly be addressed.
>
> . . .
>
> The court considers this area of dispute to be of utmost importance. The crux of the Supreme Court's decision in *Brown* was that the maintenance of separate but equal facilities for black students did not assure that black children obtained a quality education. Although quality of education is not one of the six classic areas of inquiry in school desegregation cases . . . the defendants did not protest litigation of this area. The defendants acknowledge that a school sys-

> tem that is not fulfilling its obligation of providing quality education to all school children should not be entitled to unitary status.

(Pet. App. 29a, 60a).

The court placed the burden of proof upon the DCSS with respect to this seventh factor (Pet. App. 60a). The court also rejected the DCSS's contention that relief in this area was not proper, noting that "[a] district court properly has broad discretion in desegregation cases to order relief that will facilitate the speedy eradication of all vestiges of the former dual system. Improving the quality of education for all children, especially black children, is the underlying purpose of all desegregation cases." (Pet. App. 71a).

With respect to this seventh factor — "quality of education" — the district court extensively reviewed the DCSS's allocation of educational resources and the achievement of students. (Pet. App. 60a-71a). Based on this review, the district court ordered the DCSS to distribute its experienced teachers and teachers with advanced degrees equally and to equalize expenditures among the schools. (Pet. App. 65a-70a). The court also ruled that further supervision of the DCSS was not necessary to ensure that it continue to take steps to facilitate the education of black students. (Pet. App. 62a-65a, 69a-70a).

On November 13, 1989, a panel of the U.S. Court of Appeals for the Eleventh Circuit reversed certain portions of the district court's decision. *Pitts v. Freeman*, 887 F.2d 1438 (11th Cir. 1989). Specifically, the appellate court held that the trial court had erred in ruling that unitary status could be achieved "incrementally." (Pet. App. 14a-17a).

The court of appeals further held that the DCSS was responsible for any resegregation in student assignment — even that which was caused by a demographic shift in the county — until unitary status was achieved in all areas within the school system. (Pet. App. 18a-22a). The court of appeals also rejected the district court's separate consideration of "quality of education", directing that this seventh factor should be considered only to the extent that it could be subsumed within the six *Green* factors. (Pet. App. 13a-14a, n. 8).

On February 12, 1990, the DCSS filed in this Court its Petition for Writ of *Certiorari*, seeking review of two issues. First, the DCSS sought review of the appellate court's ruling that unitary status could not be achieved incrementally. Second, the DCSS challenged the appellate court's ruling that the DCSS was obligated to prevent resegregation, even where that resegregation was not directly caused by the DCSS, as long as the overall school system had not achieved unitary status. On February 20, 1991, this Court granted the DCSS's Petition for Writ of *Certiorari*, agreeing to review the two questions presented by the DCSS.

III.

SUMMARY OF THE ARGUMENT

The mandate of the Equal Protection Clause in cases such as the present one is to achieve a public school system wholly free from racial discrimination. This objective requires that *every* aspect of the educational system is to be freed from the discriminatory vestiges of illegal conduct. Before determining whether the eradication of those vestiges must be incremental or simultaneous, the

Court must first determine the standards by which such vestiges are to be identified.

In determining whether the vestiges of prior illegal segregation within a public school system have been eliminated sufficiently to satisfy the mandate of the Equal Protection Clause, the Court's consideration should not be limited to the six components of school system operation identified in *Green*. Rather, the Court's consideration should extend to *every* aspect of the educational system, including quality of education. To the extent that the decision of the court of appeals precludes this expanded examination by a district court, that decision is erroneous.

It is, therefore, the position of these Plaintiff-Intervenors that the district court should continue to scrutinize all aspects of the school system's operations, including the quality of education within the system, for vestiges of discrimination which are caused by the DCSS's illegal segregation.

IV.

ARGUMENT

A. The Issue Presented by Plaintiff-Intervenors is Properly Before the Court.

Any decision by this Court in the present case will be examined by the courts below for guidance as to the proper standards to be used in determining whether vestiges of a prior dual system have been eliminated and, thus, whether the mandate of the Equal Protection Clause has been satisfied. In its Petition for Writ of *Certiorari*, the DCSS has asked this Court to clarify whether such vestiges must be eliminated simultaneously from all

facets of school system operations. Unless this Court clarifies what is meant by all aspects of school system operations, however, its guidance to the lower courts will be ambiguous and incomplete.

The precise meaning of the term "unitary status" and the criteria for determining whether vestiges of a prior dual system have been eliminated are thus predicate issues to the intelligent resolution of the questions on which *certiorari* was granted. A precise definition of the facets to be considered in determining the existence of unitary status is essential to the correct disposition of the questions presented in the petition for *certiorari*. Accordingly, the issue presented herein by Plaintiff-Intervenors is appropriate for consideration by the Court in the context of this proceeding. *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Vance v. Terrazas*, 444 United States 252 (1980); *United States v. Mendenhall*, 446 U.S. 544 (1980); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

B. As Standards for Determining Whether Vestiges of a Dual System Have Been Eliminated From Every Aspect of School Operations, the Green Factors are Inadequate and Incomplete.

The court of appeals concluded that the *Green* Court intended quality of education to be considered only "in conjunction with each of its six enumerated factors." (Pet. App. 14a, n. 8). Accordingly, it directed the district court to consider the distribution of educational resources only "in relation to the area in which the school system applies the resource." (Pet. App. 14a, n. 8). However, several of the indicia of quality of education considered by the district court do not fall within any of the areas described

in *Green*. The directive of the court of appeals thus effectively precludes consideration of those important aspects of quality of education.

In the present case, the district court found that "[b]oth the allocation of educational resources and the achievement of students are interrelated issues that must be examined to determine whether black students are receiving the same quality education as white students." (Pet. App. 62a). Accordingly, the court embarked upon an extensive examination of both of these "interrelated issues." (Pet. App. 62a-71a).

The district court utilized several criteria for measuring the "allocation of educational resources." (Pet. App. 65a-71a). Some of these criteria (teacher education, teacher experience, and teacher turnover)[4] are in some way related to the "faculty" issue identified in *Green*, but the elements which were considered by the district court in examining these criteria differed from the elements which were considered in examining the "faculty" issue.[5] Other "resource-allocation" criteria examined by the district court (per pupil expenditure, library books per

[4] In its discussion of "quality of education," the district court found that, on average, historically black schools had less experienced teachers, fewer teachers with advanced degrees, and a higher rate of teacher turnover. (Pet. App. 65a-68a).

[5] In its examination of the "faculty" and "staff" criteria identified in *Green*, the district court and the appellate court considered only the distribution of black and white teachers throughout the system, without reference to levels of teacher education, teacher experience, or teacher turnover. (Pet. App. 17a-18a, 48a-59a). Instead, these latter criteria were considered by the district court only under the heading of "quality of education." (Pet. App. 65a-68a).

student)[6] are some ways related to the "facilities" issue identified in *Green*, but the elements which were considered in examining these criteria differed from the elements which were considered in examining the "facilities" issue.[7] Moreover, several of the criteria examined by the district court relative to resource allocation — or school treatment — are largely unrelated to any *Green* factor. These resource-allocation criteria examined by the district court — but unrelated to any *Green* factor — include student retention, uniformity of curriculum, the presence of innovative educational programs, and the availability of supplementary instructional personnel. (Pet. App. 60a-62a, 69a-70a) .

While several of the resource-allocation criteria examined by the district court are unrelated to any *Green* factor, the same can also be said of *all* of the criteria examined by the district court with respect to student achievement. In considering student achievement, the court examined the relative progress of black and white students as measured by the Iowa Tests of Basic Skills. (Pet. App. 63a-64a). In addition, the district court compared the performance of black and white students within the system

[6] In its discussion of "quality of education," the district court found that the DCSS invested "a larger percentage of its financial resources" in predominantly white schools, rather than in other schools where the needs were "more significant." (Pet. App. 70a).

[7] Inasmuch as Respondents below conceded that the DCSS had fulfilled its constitutional obligation in the area of "physical facilities," this area was not subjected to an in-depth examination by the district court. (Pet. App. 59a-60a). However, it appears that the court's limited consideration of the "physical facilities" issue identified in *Green* related only to buildings and grounds rather than money and books. (Pet. App. 59a-60a).

as measured by the Scholastic Aptitude Test with the performance of black and white students nationwide. (Pet. App. 64a). It also compared the performance of black students and white students within the system as measured by promotions and as measured by the California Achievement Test. (Pet. App. 64a). However, there is no *Green* factor which accommodates such an examination.

In determining whether black students in the DCSS obtain quality education, the district court thus examined several useful criteria. These criteria are useful because they focus on resources and on results.[8] However, many of these criteria are incapable of being subsumed within any *Green* factor. Nevertheless, it would be improper to exclude these criteria from any listing which purports to include "every aspect of school operations."

C. The Green Factors Are Not Intended to be the Exclusive Measure by Which the Elimination of Vestiges of Segregation is to be Determined.

While the district court considered "quality of education" as a seventh factor in evaluating whether the vestiges of the old dual system had been eliminated, the court of appeals disapproved consideration of any factor other than those expressly enumerated in *Green:*

> The district court also considered a seventh factor: "quality of education". We conclude that the *Green* Court intended quality of education to be

[8] There is ample authority for evaluating a school system's progress in terms of results. See, e.g., *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971) ("The measure of any desegregation plan is its effectiveness.").

> considered in conjunction with each of its six enumerated factors. *See, Green*, 391 U.S. at 435 (describing the six factors as comprising "every facet of school operations"). In this case, the district court should consider the distribution of educational resources in relation to the area in which the school system applies the resource.

(Pet. App. 14a, n. 8).

The restrictive approach taken by the court of appeals is unsupported by the facts of this case. As shown above, the district court demonstrated the existence of several types of resources which have no corollary in any *Green* factor. The district court's analysis also recognized the importance of student achievement, an issue which transcends the resource-allocation criteria embodied in *Green* but which lies at the core of quality education. In a system in which the education of black children has been characterized by "past inadequacies", the elimination of *all* such inadequacies must be a principal concern.

The refusal by the court of appeals to consider factors other than those enumerated in *Green* is also unsupported by the applicable law. This Court has recently cautioned against the use in school desegregation cases of mechanical formulas not actually found in the Constitution. "The constitutional command of the Fourteenth Amendment is that '[n]o State shall . . . deny to any person . . . the equal protection of the laws'." *Board of Educ. of Oklahoma City Public Schools v. Dowell*, ___ U.S. ___ , 111 S. Ct. 630, 636 (1991). In responding to this constitutional command, the basic task of the courts is to achieve *"a public school system wholly free from racial discrimination." Milliken v. Bradley*, 433 U.S. 267, 283

(1977) *("Milliken II")* (quoting *United States v. Montgomery Bd. of Educ.*, 395 U.S. 225, 231-32 (1969))(court's emphasis). The objective in converting a school system from dual to unitary is "to eliminate from the public schools *all* vestiges of state imposed segregation." *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U. S . 1, 15 (1971) (emphasis supplied).

Given this broad objective, constitutional compliance cannot be predicated simply upon the absence of any vestige of illegal segregation in any of the six areas of school operation enumerated in *Green*. To argue to the contrary would be to elevate these six factors from mere indicators to exclusive categories. This transformation would be especially improper given this Court's recognition that those factors are merely indicative, not determinative, of whether a school system has eradicated all vestiges of discrimination from its school operation. *See, Swann*, 402 U.S. at 18 (describing the *Green* factors as "*among* the most important indicia of a segregated system.") (emphasis added).[9]

D. A Public School System Cannot Be Wholly Free from Discrimination if Vestiges of Segregation are Present Within the Quality of Education Provided to its Students.

This Court has already sanctioned the consideration of factors other than those enumerated in *Green* in de-

[9] Even the court of appeals, in its opinion below, recognized that "the *Green* factors are not entirely synonymous with the vestiges of past discrimination," and that "these vestiges encompass more than the *Green* factors..." (Pet. App. 14a-15a). In the light of these observations, the appellate court's refusal to permit consideration of factors not enumerated in *Green* is especially incongruous.

termining whether all vestiges of a previous dual system have been eliminated. In *Milliken II, supra,* this Court acknowledged that any condition within a school system which violates the Constitution or which flows from such a violation is impermissible and subject to remediation. *Milliken II*, 433 U.S. at 282-283. Where a constitutional violation has been found, the Court in *Milliken II* determined that "the remedy does not 'exceed' the violation if the remedy is tailored to cure the *'condition* that offends the Constitution.'" 433 U.S. at 282 (quoting *Milliken v. Bradley*, 418 U.S. 717, 738 (1974))(court's emphasis). Where the "condition" offending the Constitution is a *de jure* segregated school system, it may be so pervasively and persistently segregated as to give rise to a need of compensatory educational programs. *Id.* at 283-88.

As an example of how the need for compensatory education may itself be a vestige of segregation, the Court in *Milliken II* noted that

> [c]hildren who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community.

Id. at 287. Noting the "central *educational* function of the schools",[10] *Milliken II* thus suggests that the need of black children for compensatory education, because of a disparity between the achievement of black children and that of white children, may itself be a vestige of segregation. In *Milliken II*, "the Court not only extended its conception of the systemic vestiges that may require elimination before unitary status can be achieved beyond that it had articulated in *Green*, but recognized that the individualized effects of unlawful segregation may also need remediation." Comment, *Eliminating the Continuing Effects of the Violation: Compensatory Education as a Remedy for Unlawful School Segregation*, 97 Yale L.J., 1173, 1192 (1988). Following *Milliken II*, commentators have recognized that a gap between the educational achievement of black students and their white counterparts may itself be a vestige of "a previously inferior education." *See, e.g.*, Comment, *Unitary School Systems and Underlying Vestiges of State-Imposed Segregation*, 87 Columbia L. Rev., 794, 801 (1987). Unless a district court is permitted to give full consideration to the disparities in the quality of education available to black and white children, that court will forever be unable to reach an adequate and accurate determination as to whether the school system is wholly free from discrimination.

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[10] 433 U.S. at 280, n. 15 (court's emphasis). Several lower courts have recognized this "central educational function". *See, e.g., Stell v. Savannah-Chatham County Bd. of Educ.* 888 F.2d 82, 85 (11th Cir. 1989) ("The goal is education"); *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 389 (5th Cir. 1967) ("If Negroes are ever to enter the mainstream of American life, as school children they must have equal educational opportunity with white children.")

It is thus clear that compliance with the Fourteenth Amendment cannot be predicated solely upon the absence of discriminatory vestiges within the six facets of a school's operation identified in *Green*. Rather, the existence of vestiges of illegal segregation within any aspect of a public school system precludes a finding of constitutional compliance.

A construction of *Green* which allows federal courts to find constitutional compliance merely upon review of the six limited categories of *Green* mistakenly treats those categories as if they were some magic talisman in determining whether a school system has automatically complied with its constitutional obligation. However, this Court's opinion in *Dowell, supra*, cautions against such a mechanical, limited interpretation, emphasizing that artificial labels are not the important issue in school desegregation cases. Rather, the dispositive issue is whether the Equal Protection Clause has been offended.

The limited scrutiny approved by the Eleventh Circuit Court of Appeals is clearly at odds with this Court's prior rulings that *any* condition within a public school system which offends the Constitution must be remedied before compliance with the Fourteenth Amendment can be found to exist. Moreover, the appellate court's narrow reading of *Green* invites federal courts to ignore the presence of discriminatory vestiges in the very centerpiece of public schools, namely, the quality of education provided to each student.

This Court's earlier opinions in *Swann*, *Milliken II*, and *Green* counsel that, within the primary and secondary public school context, compliance with the Equal Protection Clause will be found only where no vestige of illegal discrimination exists anywhere within the school system. This direction necessarily compels evaluation of the entire educational process of a school system. Whether or not the six factors mentioned by the *Green* Court are met is not, in and of itself, determinative. Rather, at the very least, federal courts supervising the remedial efforts of public school systems must evaluate whether the quality of education provided therein has been affected by illegal discrimination. Any evaluation short of this ignores the teachings of this Court and the public school systems' central goal of educating students.

IV.

CONCLUSION

First and foremost, Plaintiff-Intervenors respectfully request that this Court direct that quality of education, along with all other facets of a school system's operation, must be free from vestiges of illegal segregation before a school system which once segregated its students on the basis of race can be declared to have remedied its prior illegal conduct. To the extent that it holds to the contrary, the ruling of the court of appeals should be reversed.

Further, Plaintiff-Intervenors request this Court to affirm the judgment of the Eleventh Circuit Court of Appeals to the extent that it holds that a school system must simultaneously eradicate all vestiges of illegal discrimination in all areas within that school system. Finally, Plaintiff-Intervenors request this Court to reverse the appellate court judgment insofar as it obligates the Petitioners to remedy any racial imbalance in student assignment which was caused by demographic changes and not by the Petitioners.

Respectfully submitted,

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APPENDIX OF PLAINTIFF-INTERVENORS

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IN THE UNITED STATE DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANKIE PRATHER, et al.	:	
	:	
VERSUS	:	CIVIL NO. 11946-WCO
	:	CT. AP.# 91-8065
ROBERT R. FREEMAN, et al.	:	

ORDER

This case is presently before the court on the following motions: (1) motion by various class members to intervene or create a sub-class; and (2) motion by plaintiffs to join or add the DeKalb County Branch of the NAACP ("DeKalb Branch"), Adesina Scott, Adreana Scott, Ardona Scott, Artemis Mills, Valencia Mills (each by their parents and next friends), and Berta Mills. On April 26, 1990, the defendants moved that a hearing be conducted with regard to the intervention issue. The court granted this motion, and accordingly held a hearing in the nature of a trial from August 6 to August 9, 1990 and August 15 to August 16, 1990.[1] During the course of this hearing, the intervenors, plaintiffs, and defendants each examined and cross-examined witnesses, and introduced evidence.

After reviewing the testimony, evidence, and arguments of the parties, for the reasons set forth below, the court rules as follows: (1) motion to intervene is granted; (2) plaintiffs' motion to join or add parties is denied with respect to the DeKalb Branch and Artemis Mills, but

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[1] The hearing pertained to the motion to join or add parties, as well as the motion to intervene.

granted with respect to the remaining individuals. In addition, the court redefines the class to include all black children enrolled in the DeKalb County School System ("DCSS") and their parents or guardians.[2]

I. FINDINGS OF FACT

A. *Intervention*

Eighteen parent members[3] of the plaintiff class have moved to intervene as class representatives in the captioned lawsuit on behalf of their children. In support thereof, they cite a failure on the part of the current class representatives[4] to adequately represent their views and the views of many other class members. The intervenors[5] seek one of three alternative remedies for this alleged inadequacy of representation — (1) substitution of themselves for the present class representatives; (2) intervention as class representatives in addition to the present class representatives; or (3) creation of a sub-class with them as the representatives of that sub-class.

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[2] The court notes that the Southeastern Legal Foundation has filed a motion for leave to file an amicis curiae brief in the captioned case, and has submitted that brief therewith. The Foundation's motion is granted, and the court, accordingly, has reviewed and considered the arguments raised in the amicus brief in reaching its decision.

[3] These individuals are: Harold M. Armstrong, Asahiti El-Shabazz, Narwanna El-Shabazz, Carolyn Saunders, Wayne Jones, Carolyn Jones, Adib Sabir, Mahasin Sabir, Grace Thomas, Marguerite Creamer, Evelyn Bailey, Larry Bailey, Karen Russell, Kevin Russell, Nina Perry, William McVay, Rose Stewart, and Betty Blake.

[4] These individuals, Major Scott, Cynthia Scott, and Roger Mills, will be referred to interchangeably as "class representatives" or "plaintiffs."

[5] The court will refer to the movants for intervention as the "intervenors."

During the course of the hearing, eleven witnesses testified on behalf of the intervenors. Nine of these witnesses consisted of black parents of children enrolled in various schools within the DCSS,[6] though not all of them were intervenors. Overall, the court found these witnesses to be very knowledgeable and active with regard to the DCSS. Seven of them hold or have held various leadership positions within their respective Parent-Teacher Associations. The others, though maybe not as involved in the organizational sense, appeared highly informed and concerned, nonetheless.

The black parents who testified for the intervenors were uniformly opposed to mandatory busing and indicated that most black parents with whom they have contact express similar opposition. The intervenors' witnesses believe that quality of education should be the most important consideration, and should not be sacrificed solely for the purpose of obtaining strict racial balance through busing. Despite their staunch opposition to mandatory busing, however, the court found that when pressed on the issue, most of the parents conceded that if all voluntary methods of desegregation failed, involuntary means may become necessary.

The court further finds that the black parents that testified for the intervenors believe, for various reasons, that the plaintiffs and their counsel are completely and solely in favor of mandatory busing as a means of deseg-

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[6] The two remaining witnesses were Harry L. Ross, president of H. Ross Research Enterprises, Inc., who testified with regard to the "Ross Poll," and Judge Benjamin W. Spaulding, Jr. who testified with regard to his involvement with *Calhoun v. Cook*, the Atlanta school desegregation case.

regation. The presence of such a myopic view of the remedies in this case on the part of the plaintiffs, according to the intervenors, is precisely why intervention is necessary. In other words, the *intervenors feel that their opinions are being ignored by the plaintiffs, and therefore their involvement as representatives in the case is essential to ensure that all remedial avenues are properly explored.*

The intervenors also cross-examined the current class representatives, Mr. Mills, Mrs. Scott, and Mr. Scott. From the testimony of Mr. and Mrs. Scott, as well as the testimony of others with regard to them, the court finds that neither of them has been a very involved class representative. In addition, their understanding of the case is superficial, to say the least.

Significantly, at one point during her testimony, Mrs. Scott indicated that she does not oppose the proposed intervention, even though she previously had indicated the contrary in her affidavit. Mr. and Mrs. Scott are clearly more amenable to mandatory busing than the intervenors. Mr. Scott, however, inconsistent with his busing position, stated that he felt that he should have the choice of sending his kids to community schools.

Mr. Mills, on the other hand, clearly has a very keen understanding of this litigation. He has shown great dedication and commitment to his role as a class representative. The court observes, however, that his testimony indicates that he maintains a very paternalistic view of that role. Mr. Mills is of the opinion that the intervenors are naive and ill-informed to believe that voluntary desegregation remedies can be successful. He pays lip service to the notion of voluntary desegregation remedies, but it is

obvious that he has a totally skeptical view of the possible success of any such measures.

Six black parents testified on behalf of the plaintiffs. As with the witnesses called by the intervenors, the plaintiffs' witnesses were likewise well-informed and very involved in their children's education. Interestingly, the court found very little difference between the views and concerns expressed by these witnesses and those expressed by the intervenors' witnesses. They of course differ with regard to who they thought would more adequately represent the class, but besides that, there are few noticeable differences. Most significantly, the plaintiffs' witnesses, by and large, did not appear as one dimensional in their views with respect to the appropriate remedies as Mr. Mills or the other plaintiffs. Like the intervenors, their major concern is that all children receive a quality education. In addition, one of the plaintiffs' witnesses, Barbara Lee, indicated that she did not oppose intervention so long as the current class representatives are not displaced.

Although there appears to be some concern on the part of the plaintiffs that the intervenors intend to violate the Eleventh Circuit's mandate,[7] the court finds that the

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[7] *See Pitts v. Freeman*, 887 F.2d 1438 (11th Cir. 1989). At the "intervention" hearing, the plaintiffs introduced into evidence a letter from Charles Johnson, attorney for the intervenors, to Marcia Borowski, attorney for the plaintiffs, requesting that she file a petition for a writ of certiorari with the United States Supreme Court with regard to the Eleventh Circuit's decision in this case. Ms. Borowski and the plaintiffs refused this request, and now argue that it would have been ludicrous and clearly not in the best interest of the class to

intervenors are committed to upholding the Eleventh Circuit opinion. The court also finds that the intervenors are not totally monolithic and unyielding in their position, but rather would be amenable to entertaining all views in this case.

B. *Joining or Adding Parties*

1. DeKalb Branch

At the outset, the court notes that the DeKalb Branch has been involved in this case throughout its pendency. The court is well aware that the DeKalb Branch has provided the plaintiffs with both legal and financial resources, and that it has also served in somewhat of an advisory capacity. Until the intervention hearing, however, the court had no idea of the actual magnitude of this involvement.

After listening to the testimony of various witnesses regarding the DaKalb Branch's involvement, the court is convinced that, for the most part, it has been controlling this litigation. Critical decisions such as the ones to appeal

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petition the Supreme Court for certiorari in a case that they had "won."

Such a statement may have been accurate if the intervenors had been seeking, through their request, to have the entire Eleventh Circuit decision reversed. This, however, was not their intent. Rather, they were concerned primarily with the Eleventh Circuit's pronouncement that "quality of education" is not a separate and independent consideration in the "unitariness" calculus. *See* 887 F.2d at 1445 n.8; *see also* Plaintiffs' Exhibit No. 2. As a result, the court finds that the intervenors' request that the plaintiffs file a petition for a writ of certiorari does not indicate contempt for the mandate. It simply shows that the intervenors believe that the court of appeals was incorrect with regard to a particular aspect of its decision.

this court's order of 1988 and to terminate the plaintiffs' former counsel, Don Edwards, were apparently made largely at the direction of the DeKalb Branch.[8] In addition, a statement was drafted by this organization, with little apparent input from the plaintiffs, that purports to express the views of both the plaintiffs and the NAACP. *See* Intervenors' Exhibit No. 11.

The court finds that the decision to seek the addition of the DeKalb Branch as a party was, at least in part, a reaction to the motion to intervene or create a sub-class. The plaintiffs hoped that by adding the DeKalb Branch they could better resist the intervenors' challenge to the adequacy of the current class representation.

Both the defendants and the intervenors asked numerous witnesses how they thought conflicts between the DeKalb Branch and the class representatives would be resolved, assuming of course that the DeKalb Branch is indeed added as a party. For the most part, the witnesses equivocated, indicating only that they could not foresee an irreconcilable conflict ever arising. Patricia Jones, President of the DeKalb Branch, stated on cross-examination, however, that in the event of an unresolvable conflict, "[t]he National — the board will — we would take the position that the DeKalb NAACP and the National Office decide on."

NAACP officials were also asked to what degree local branches are required to abide by national rules and

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[8] According to the testimony of Zepora Roberts, chair of the Dekalb Branch's Education Committee, Mr. Mills attended the meeting regarding the appeal of this court's order, but neither of the Scotts were present.

guidelines. In short, they indicated that local branches, including the DeKalb Branch, are required to follow national rules if they wish to remain viable, but that this did not mean that the national organization would seek to control this litigation, in the event that the DeKalb Branch is added as a party.

The court observes, however, that several of the NAACP's guidelines appear to indicate that the National NAACP would have a great deal of control. Part IX of the "NAACP Civil Rights *Handbook*," for example, provides in part that:

> Where negotiated plans are voluntary or the result of litigation, NAACP Branches or representatives *must not* become a party to or give approval of any plan or settlement in the local community without *first* consulting with and submitting said plan to the National Office for examination and written approval.

Defendants' Exhibit No. 3, NAACP Civil Rights *Handbook*, p. 42 (emphasis in original). In addition, the *Handbook* states that:

> Assuming approval is given for [a] unit to become involved in . . . litigation, the General Counsel reserves the right to personally, or through his designees(s) [sic], represent the Association. This will ordinarily mean that, minimally, the General Counsel should be listed on the papers unless another member of the Legal Department's staff has been previously designated.

Id at p. 5.[9] Given this, if the DeKalb Branch is added, the court finds that the national organization would have a very powerful voice in this case, if not the final say in many instances.

The court further concludes that the DeKalb Branch only wishes to assert that which the plaintiffs are currently asserting. It does not seek to add anything new, nor does it oppose anything presently being advocated by the plaintiffs. In addition, the DeKalb Branch has not expressed any dissatisfaction with the current class representatives or their counsel. In fact, if added, the lead counsel for the DeKalb Branch will be the plaintiffs' present attorney, Ms. Borowski.

Lastly, the court observes that as an entity, the DeKalb Branch does not qualify as a class member as redefined by the court in this order.

2. Other Parties

The plaintiffs have also moved for the removal of Princess Mills and Frankie Prather as plaintiffs in this case, and the addition of certain children of the current class representatives (by their parents and next friends). In addition, the plaintiffs seek to have Berta Mills, former wife of Roger Mills, added as a named plaintiff.

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[9] Another example of the degree of control exerted by the national organization in legal matters can be found in Part III of the *Handbook*, where it is stated that:

> The national legal staff should be advised of every legal step before it is taken. If this advice is followed, we normally will not have to concern ourselves with being unable to appeal because of some technicality...

Defendants' Exhibit No. 3, NAACP Civil Rights *Handbook*, p. 11.

The children that the plaintiffs seek to add are: Adesina Scott, Adreana Scott, Ardona Scott, Valencia Mills, and Artemis Mills. With regard to these individuals the court finds that each of them, with the exception of Artemis Mills, is presently enrolled in the DCSS. As for Ms. Mills, the court finds that she currently has physical custody of her children, though she shares legal custody with Mr. Mills.

II. CONCLUSIONS OF LAW

A. *Adequacy of Current Class Representation*

As stated, in support of their motion to intervene, the intervenors cite a failure on the part of the current class representatives to adequately represent their views and the views of many other class members. They assert that any one of the following three alternatives can remedy this situation: (1) replace the current class representatives with the intervenors; (2) allow the intervenors to intervene as class representatives in addition to the present representatives; or (3) create a sub-class with the intervenors as the representatives of that sub-class. For the reasons set forth below, the court concludes that the appropriate remedy is intervention by the intervenors without displacement of the current class representatives.

1. Replacement of Current Class Representatives

The intervenors first argue that the present class representatives do not adequately represent the views of the class, and therefore should be relieved of their role as representatives. Although the intervenors claim that Mr. and Mrs. Scott are inadequate because they are uninvolved and not well informed,[10] for the most part, their "inadequacy" argument focuses more upon the assertion that they, rather than the plaintiffs, would be the "most adequate" class representatives.[11]

According to the intervenors, the most adequate representatives of a class are those individuals who will represent the majority of the class' wishes. *See* Intervenors' Brief Regarding Proper Class Representation, pp. 9-10. The intervenors allege that the plaintiffs cannot meet this criteria because they are in favor of strict racial balance, achieved through massive, involuntary busing, whereas the majority of the class opposes mandatory busing.[12]

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[10] The court has some serious concerns with the quality of class representation provided by Mr. and Mrs. Scott. That concern, however, is not so great as to warrant their removal on the grounds of inadequacy.

[11] The intervenors also appear to argue at one point that Ms. Borowski is inadequate as class counsel, and hence should be removed. The court notes, however, that the intervenors have not questioned, and indeed cannot question, Ms. Borowski's professional competence or her vigorousness as an advocate in this suit.

In addition, the intervenors' allegation of the existence of some irreconcilable conflict arising from Ms. Borowski's representation of both the plaintiffs and the Dekalb Branch should no longer be of concern, given that the court has denied the plaintiffs' motion to add the Dekalb Branch as a party. *See infra* at pp. 23-26.

[12] The intervenors apparently rely heavily on the "Ross Poll" to support their contention that the majority of black parents with children in the DCSS oppose mandatory busing to achieve racial balance. *See* Intervenors' Exhibit No. 6. As will be discussed, the court has some serious reservations with regard to this poll, and accordingly gives it very little evidentiary weight.

In addition, the court notes that in opposition to the intervenors' arguments, the plaintiffs assert that the intervenors have

The court does not agree with the intervenors' proposition that the most adequate representatives are those who represent the views of the majority of the class. The intervenors claim that this proposition is supported by *East Texas Motor Freight System Inc. v. Rodriguez.*, 431 U.S. 395 (1977), in which they allege that the Supreme Court deemed "the purported class representatives inadequate . . . *precisely* because the majority of the class members disavowed the relief sought by the self-proclaimed representatives." Intervenors' Brief Regarding Proper Class Representation, p. 10 (emphasis added). In addition the intervenors assert that the Court "[q]uite simply, [found that] representative status in a class action could not be given to individuals who were not reflective of the purported beneficiaries' wishes." *Id.*

If these clear, definitive statements were actually present in or supported by the Court's opinion, this court would have no difficulty accepting such statements as the law. After reading *East Texas* several times, however, the court can only conclude that the intervenors have significantly embellished the Supreme Court's holding to cover the factual setting presented in this case.

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mischaracterized their position as being one in favor of massive, involuntary busing. On the contrary, the plaintiffs claim that they are supportive of any measure that can achieve the constitutionally mandated goal of "maximum feasible desegregation." In addition, they assert that the fact that the intervenors possess a different view as to the types of remedies to be sought does not justify displacement of the current class representatives. In the plaintiffs' view, so long as they are vigorously pursuing maximum feasible desegregation, they are adequate and should remain as the lone class representatives.

In *East Texas*, which involved a class action under Title VII, the named plaintiffs sought a merger of "city- and line-driver collective bargaining units." *Id.* at 405. A large majority of the class, however, had previously rejected this very same proposal. Clearly, the position taken by the named plaintiffs in *East Texas* and the majority of the class were completely opposite. In addition, the Court found that the class representatives were not members of the class they purported to represent and that they had failed to move for class certification. Given this, the Court had no difficulty concluding that the named plaintiffs did not fairly and adequately represent the views of the class. *Id.* at 403-05.

In this court's opinion, the Supreme Court in *East Texas* did not hold that the most adequate representatives are those who represent the views of the majority of the class. The fact that the relief sought by the named plaintiffs was opposed by the majority of the class was but one factor that contributed to the Court's ultimate conclusion. In addition, the court notes that the views of the named plaintiffs and the majority of the class were diametrically opposed — the plaintiffs sought something that the majority had specifically rejected. After listening to six days of testimony in the captioned case, the court is convinced that, overall, such diametric opposition is not present between the views of the plaintiffs and those of the intervenors, with the possible exception of some of the views expressed by Mr. Mills and Ms. Borowski.

The intervenors also rely upon *Hansberry v. Lee*, 311 U.S. 32 (1940), to support their position. The court finds, however, that, once again, their reading of the case is overly broad. As with *East Texas*, this case stands for the

proposition that when two totally opposite interests may be asserted with regard to an issue in a class action, the individuals who support one interest cannot be deemed to adequately represent those who support the opposite interest. In *Hansberry*, the owners of certain plots of land in a particular area agreed in writing to restrict to whom their land could be sold. The Court found it clear that the owners who desired to have the agreement enforced could not adequately represent the interests of those owners who sought to resist performance. *See id.* at 44.

A helpful analogy to both of these cases would be a coin toss between two individuals. With a coin toss, each individual has an interest in one object, however, one person wants the coin to land heads up while the other desires tails up. The views of the intervenors and the plaintiffs in this lawsuit, though different to an extent, are definitely not polar opposites an was the case in the "coin toss-type" situations found in *Hansberry* and *East Texas*. As with all desegregation cases, the captioned case involves numerous types of potential remedies, and hence does not fit neatly within the "either or" scenario found in these Supreme Court cases.

The court is of the opinion that in class actions, particularly those involving school desegregation, it is essential that all views be heard. Whether a specific view is supported by a majority or a minority of a class is irrelevant for the court's purposes. In the end, *this court* must determine what remedies will best effectuate maximum feasible desegregation, not which views carry the greatest popular support. Democratic notions of majority rule, while logical to a certain degree in the class action context, do not serve the court's needs in the captioned case.

Neither do such notions best serve the interests of the members of the class — those interests are best served by allowing the court to hear all views before making its final decision.

The court also notes that even if it were to accept the intervenors' "majority rule" theory, the court is far from confident that the intervenors have accurately measured the consensus opinion of black parents with children in the DCSS. The court has difficulty with the survey methodology employed in gathering the information for the so called "Ross Poll," upon which the intervenors rely. Many of the questions posed were worded in a manner that suggested the desired answer, and the accuracy of the final statistics was never established to the court's satisfaction.[13] In the court's opinion, the only value of the Ross Poll is that it indicates that a substantial portion of the class is more adamantly opposed to mandatory busing than the plaintiffs.

Accordingly, the court holds that the intervenors should not be substituted at this time for the plaintiffs as class representatives.

2. Intervention

In the alternative to substitution of the current class representatives, the intervenors argue that they should be permitted to intervene in this suit pursuant to Rule 24 (a) (2) of the Federal Rules of Civil Procedure. This rule provides that:

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[13] In his testimony, Mr. Ross claimed that he possessed no knowledge of the statistical aspect of the poll, and indicated that his statistician would later testify in that regard. The court notes, however, that the statistician was never called as a witness.

> Upon timely application anyone shall be permitted to intervene . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicants ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24 (a) (2) . As noted previously, the intervenors claim that they possess an interest in this litigation that the plaintiffs do not adequately represent. They likewise claim, as they must, that the disposition of the captioned case in their absence may impair their ability to protect their interests. Consequently, the intervenors argue that they are entitled to intervention as a matter of right.

In *Hines v. Rapides Parish School Board*, 479 F.2d 762 (5th Cir. 1973), the Fifth Circuit[14] stated that the proper course for parent groups to pursue in presenting complaints with regard to school desegregation litigation is a petition for intervention. The court went on to indicate that such a petition

> [will] bring to the attention of the district court the precise issues that the new group [seeks] to represent and the ways in which the goal of a unitary system [have] allegedly been frustrated. . . .

[14] All decisions handed down by the Fifth Circuit prior to the close of business on September 30, 1981 constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

> If the court determine[s] that the issues that the [proposed intervenors seek] to present [have] been previously determined or if it finds that the parties in the original action are aware of these issues and completely competent to represent the interests of the [proposed intervenors], it [can] deny intervention. If the court [feels] that the new group [has] a significant claim which it could best represent, intervention [will] be allowed.

Id. at 765. Significantly, the court did not state whether it was referring to intervention as a matter of right or permissive intervention.

In *Jones v. Caddo Parish School Board*, 499 F.2d 914 (5th cir. 1974), however, the Fifth Circuit clearly indicated that under certain circumstances, intervention as a matter of right is appropriate in school desegregation cases. In this case, a group of black individuals moved to intervene because of their dissatisfaction with a proposed desegregation plan that the parties plaintiff apparently were prepared to accept. The Fifth Circuit did not address the substance of the motion because it found that the district court had erred in failing to conduct an evidentiary hearing. The court did state, however, that on remand,

> "[i]f it should be found in fact that [the proposed intervenors] represent a class of black citizens of Caddo Parish whose constitutional rights are not properly protected by plaintiffs, they should be authorized to intervene as *a matter of right*, and to present evidence in support of their contentions.

Id. at 918 (citing Fed. R. Civ. P. 24) (emphasis added).

Hence, the former Fifth Circuit, and thus the Eleventh Circuit as well, clearly have authorized intervention as a matter of right in class action suits involving school desegregation when the appropriate circumstances are present. The plaintiffs, nevertheless, contend that intervention by parents in school desegregation cases is not a matter of right, but rather, if allowed at all, is permissive. They cite numerous cases in support of this proposition; however, the court finds that these cases either do not stand for the plaintiffs' proposition or else are inapposite to the intervenors' situation.

In *St. Helena Parish School Board v. Hall*, 287 F.2d 376 (5th Cir.) , *cert. denied*, 368 U.S. 830 (1961) , for example, the Fifth Circuit did not hold that intervention in school desegregation cases is not a matter of right. Rather, the court simply held that the proposed intervenor, a white student by his parents, was properly denied the right to intervene by the trial court because he failed to show that "the representation of his interest in the litigation was or might be inadequate." *Id.* at 379. All that this case establishes, therefore, is that a "patron" of a school system does not have an *absolute* right to intervene in a school desegregation case by sole virtue of the fact that he is such a "patron" — he must also meet the requirements of Rule 24(a).[15]

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[15] *But see Stell v. Savannah-Chatham County Board of Education*, 333 F.2d 55 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964). In this case, the court interpreted *St. Helena* to mean that "intervention in school desegregation cases is not a matter of right but of discretion upon good cause being shown." *Id.* at 60. Admittedly, this statement can be read to support the plaintiffs' position in the captioned case. This court is of the opinion, however, that in using the phrase "a matter of right," the

Another case upon which the plaintiffs rely, *Valley v. Rapides Parish School Board*, 646 F.2d 925 (5th Cir. 1981), likewise does not establish that there is no intervention as a matter of right in school desegregation cases. In this case, the Fifth Circuit held that the movants for intervention were not entitled to intervene as a matter of right because they sought to oppose the desegregation plan, and as such, failed to demonstrate the required interest in a desegregated school system. *See id.* at 941; *see also United States v. Perry County Board of Education*, 567 F.2d 277, 279 (5th Cir. 1978) ("parents seeking to intervene [in school desegregation cases] must demonstrate an interest in a desegregated school system"). Although the intervenors in the captioned case possess different theories from the plaintiffs with regard to how desegregation should be achieved, it cannot seriously be argued that they have failed to demonstrate the necessary interest in a desegregated school system.

In *Pate v. Dade County School Board*, 588 F.2d 501, 503 (5th Cir.), *cert. denied*, 444 U.S. 835 (1979), the movants for intervention argued "that parents of school children [had] an interest in the [desegregation] litigation and that the failure of the school board to appeal demonstrate[d] that such interest was not being adequately represented." Although the court rejected this argument, it is again obvious that what the court actually rejected was the recognition of a blanket right to intervene solely because of one's status as a parent. The movants in this case, as in *Valley v. Rapides Parish School Board*, simply did

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court was not referring to technical "intervention of right" as provided in Rule 24(a), but rather the so-called "absolute" right to intervene that the movant in *St. Helena* sought to have that court recognize.

not meet the requirements for intervention of right as provided for in Rule 24 (a), and, therefore, were denied intervention as a matter of right.[16] The intervenors in the captioned case have shown, to the court's satisfaction, that they meet the requirements of Rule 24(a)(2), and that they are not seeking intervention solely on the bases of their position as parents.

Graves v. Walton County Board of Education, 686 F.2d 1135 (5th Cir. Unit B 1982) provides further support for the court's narrow interpretation of the former Fifth Circuit's pronouncements regarding intervention as a matter of right in school desegregation cases. In this case, the court reversed the district court's denial of intervention by a group of parents, and held instead that the parents were entitled to intervention of right under Rule 24 (a) (2). *See id.* at 1140-42 .

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[16] *See also United States v. Perry County Board of Education*, 567 F.2d 277 (5th Cir. 1978) (court found that the movants for intervention failed to demonstrate the necessary "'direct substantial, legally protectable interest in the proceedings'"). In *Adams v. Baldwin County Board of Education*, 628 F.2d 895 (5th Cir. 1980), the court interpreted the holding in *Pate* to mean that "parent groups with complaints growing out of desegregation litigation are [not] entitled to intervention as a matter of right." *Id.* at 897 n.4. As stated, this court does not interpret the type of intervention referred to in *Pate* and other Fifth Circuit cases to be the technical intervention of right sanctioned by Rule 24(a).

The court notes that the plaintiffs also rely on *Davis v. East Baton Rouge Parish School Board*, 721 F.2d 1425 (5th Cir. 1983). This decision has no binding effect in the Eleventh Circuit, however, because it was decided after September 30, 1981. See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

This court observes that the movants in *Graves* did not argue that they possessed a right to intervene based upon their status as parents. Rather, they simply alleged that based upon their interests in the litigation they were entitled to intervention under Rule 24 (a) or (b); the court of appeals found that they met the requirements of Rule 24 (a) (2) , and accordingly ruled that intervention as a matter of right was appropriate. It is of particular importance, that in reaching its ultimate conclusion, the court of appeals did not even mention the cases relied upon by the plaintiffs in the captioned case.

The court is convinced that the case law in this circuit provides for intervention as a matter of right in school desegregation cases so long as Rule 24(a)'s requirements are satisfied, and the court finds that they have been met in the present litigation. Although the court does not consider the current class representatives to be inadequate per se, it is abundantly clear that they do not adequately represent the interests of the intervenors. The intervenors seek intervention to ensure that the plaintiffs, out of an abundance of cynicism with regard to voluntary methods of desegregation, do not concentrate their efforts on obtaining mandatory busing. As the court has stated, the plaintiffs do possess a rather myopic view of the potential remedies in this case. Such a view may represent the interests of some of the class, but, as the evidence shows, it certainly does not adequately represent the views of many others.

Again, the court is compelled to emphasize that the ultimate issue in this case does not turn on what a particular group wants. Rather, it hinges upon what will best achieve maximum feasible desegregation in the DCSS.

Thus, the presence of varying views in this case is actually an asset to the entire class, for it allows the court to examine all possibilities in endeavoring to reach the most effective resolution.

Accordingly, as the court has found that requirements of Rule 24(a) (2) have been met, the intervenors' motion to intervene is granted .[17]

B. *Joining or Adding Parties*

1. DeKalb Branch

The plaintiffs assert in their motion to add or join parties under Rule 21, that the DeKalb Branch's extensive involvement throughout the pendency of this litigation proves that it has been, for all intents and purposes, a party to this action from its inception. Accordingly, they argue that the court should grant their motion out of hand, as basically a house-keeping gesture. In other words, the plaintiffs claim they are merely requesting that the court formalize that which has been understood for twenty two years. *See* Plaintiffs' Motion to Join or Add Parties, p. 3.

For various reasons, the court finds no merit in the plaintiffs' arguments. First the court notes that they have inappropriately moved to join the DeKalb Branch under Rule 21. That rule, as its heading indicates, is reserved for correcting the "Misjoinder and Non-Joinder of Parties." Fed. R. Civ. P. 21. Rule 21, in essence, provides a mechanism for ensuring that the proper parties are before the

[17] Because the court has granted the intervenors motion to intervene, their alternative request for the creation of a sub-class is now moot, and is therefore denied.

court in a given case. See *Graves v. Walton County Board of Education*, 686 F.2d 1135, 1137 (5th Cir. Unit B 1982) (allowing addition of parties pursuant to Rule 21 to keep case alive after claims of original named plaintiffs were rendered moot). It is not a vehicle for adding unnecessary individuals or entities, solely to "formalize" so-called pre-existing relationships. If this were the case, there would be no end to the number of parties who could be dropped or added to a lawsuit. The court finds absolutely no reason to join the DeKalb Branch under Rule 21; its presence as a party is wholly non-essential, and complete relief can certainly be provided in its absence.

The court further finds that the plaintiffs, instead of moving for joinder under Rule 21, should have permitted the DeKalb Branch to move for intervention pursuant to Rule 24. However, as *Hines v. Rapides*, establishes, intervention is the appropriate vehicle for allowing groups to "question . . . deficiencies in the implementation of desegregation orders . . . ." 479 F.2d at 765. Stated another way, intervention is appropriate when one has an interest to protect that is not already being protected. The DeKalb Branch does not meet this requirement. It seeks only to add its voice to that of the plaintiffs. It has not argued that the current class representation is inadequate or that it has any specific interests that are not presently being advocated. Indeed, the evidence clearly shows that the DeKalb Branch only wishes to assert that which the plaintiffs are currently asserting. Hence, the court finds that any interest that the DeKalb Branch may have in this litigation is adequately represented by the plaintiffs. Accordingly, even if the DeKalb Branch had

moved for intervention under Rule 24, such a motion would have been denied.[18]

Finally, the court notes that even if it could meet the requirements for being added as a party, the DeKalb Branch still would not qualify because it lacks standing. First, the DeKalb Branch clearly has no standing in its own right — it is not a member of the class and it cannot show injury to itself as an entity. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) (holding that an association may have

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[18] In addition, the court notes that the DeKalb Branch clearly cannot meet the timeliness requirement of Rule 24. In *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977), the former Fifth Circuit articulated the test for timeliness under Rule 24. That court mandated that in passing upon a petition to intervene, a district court must consider the following four factors: (1) "[t]he length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene"; (2) "[t]he extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case"; (3) "[t]he extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied"; and (4) "[t]he existence of unusual circumstances militating either for or against a determination that the application is timely." *Id.* at 264-66.

As admitted by the plaintiffs, the DeKalb Branch has played an integral role in this litigation from the beginning, and hence, clearly has long possessed knowledge of any interest that it may have in this case. In addition, as stated, the interest that the DeKalb Branch desires to represent is currently being adequately represented by the plaintiffs. Consequently, it will suffer no prejudice by virtue of the fact that it cannot intervene in this action. Finally, the DeKalb Branch has offered no legitimate excuse for its tardy attempt to be added to this case, and to allow its addition at this late date would undoubtedly cause prejudice to the existing parties.

standing in its own right to seek judicial relief from injury to itself, and may therewith assert rights of members, so long as those rights relate to associational ties); *see also Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 220-21 (1974) (noting the indispensability of the concrete injury requirement). Secondly, the DeKalb Branch cannot overcome its lack of individual standing by arguing that as an association, it possesses standing to sue solely as the representative of its members. *See Warth*, 422 U.S. at 511; *NAACP v. Alabama*, 357 U.S. 449 (1958). In *Warth*, the Supreme Court stated that to establish this type of standing,

> [t]he association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justifiable case *had the members themselves brought suit.*

422 U.S. at 511. *See also NAACP v. Alabama*, 357 U.S. at 459; *Barrows v. Jackson*, 346 U.S. 249, 255-59 (1953). This court finds that recognition of such standing is only appropriate when the individuals to be "represented" are not representing or cannot personally represent their own interests. This obviously in not the case in the captioned litigation.

Accordingly, as the court finds that the DeKalb Branch cannot become a party either under Rule 21 or Rule 24, and that it possesses no standing, the plaintiffs' motion to join or add the DeKalb Branch in denied.

2. Other Parties

The plaintiffs have also moved to join or add the following individuals: Adesina Scott, Adreana Scott, Ardona Scott, Valencia Mills, Artemis Mills, and Berta Mills. As noted previously, Rule 21 is appropriately invoked to ensure that the correct parties are before the court in a given case. In the captioned suit, as in many desegregation cases, the original named parties have either graduated or somehow become disassociated from this litigation. As a result, the court finds it proper to add "Adesina Scott," "Adreana Scott," "Ardona Scott," and "Valencia Mills," and to remove "Frankie Prather" and "Princess Mills" from the style of this case. In addition, as Berta Mills retains full physical custody and joint legal custody of Valencia Mills, it is only proper to add her name to the case.

The court finds it inappropriate, however, to add Artemis Mills as he is presently only three years old and admittedly not enrolled in the DCSS. Thus, he is not a member of the class at this time, and therefore cannot be added as a party.

Accordingly, the plaintiffs' motion to join or add these additional parties is granted in part and denied in part.

C. *Class Definition*

As originally certified, the class in this case was all black children enrolled in the DCSS and their black parents. Such a definition fails to acknowledge the fact, however, that not all black children enrolled in the DCSS have *black* parents. In addition, some of these children may be in the custody of a legal guardian as opposed to a

"parent." This court believes that any adult who has legal custody of a black child who is enrolled in the DCSS has an interest in this litigation, and of course should be recognized as a member of the class. Accordingly, the class definition is hereby altered to include "all black children enrolled in the DCSS and their parents or legal guardians."

D. *Temporary Restraining Order*

On December 7, 1990, the plaintiffs filed a motion for a temporary restraining order seeking to enjoin the defendants from:

> (1) spending any funds or committing to any construction contracts under the 1989 school bond issue; [and] (2) proceeding with or implementing any plans with respect to the implementation of any new junior high schools.

Plaintiffs' Motion for a Temporary Restraining Order, p. 1. In addition, the plaintiffs requested that the court hold a hearing at which the defendants must show cause why they "should not be held in contempt for violating their commitment . . . to refrain from committing any new dollars or letting any new contracts under the 1989 school bond issue." *Id.*

The court conducted a telephone conference with counsel for the plaintiffs and defendants on December 13, 1990. After listening to the arguments and explanations from each side, the court is not convinced that there has been any so called violation of the defendants' "commitment." Accordingly, the plaintiffs' motion for temporary restraining order is denied at this time.

Nevertheless, the court is concerned that the defendants are being less than forthcoming with the plaintiffs. As a result, the court hereby orders that no further funds be allocated or committed by the defendants without prior report to the attorneys for the plaintiffs' and the intervenors, and subsequent approval by this court, unless otherwise ordered. Further, the court directs the parties to meet and confer with one another in an attempt to address the issues that have been raised by the plaintiffs in their most recent motion, as well as their previous motion for a preliminary injunction.[19] The court will take no additional action in this regard unless and until the matter is once again brought before it.

[19] The court notes that this motion also included a request to enforce the mandate of the court of appeals, as well as the orders of this court. In addition, the plaintiffs previously filed a motion to compel discovery, convene a discovery conference, and appoint a monitor to assure the flow of information. These motions all basically involve the same dispute as that raised in the plaintiffs' most recent motion for a temporary restraining order, and should accordingly be addressed by the parties during the conference that the court has directed them to conduct.

Conclusion

For the reasons set forth, the intervenors' motion to intervene is granted; the plaintiffs' motion to join or add parties is denied with respect to the DeKalb Branch and Artemis Mills, but granted as to Adesina Scott, Adreana Scott, Ardona Scott, Valencia Mills, and Berta Mills; and the class is redefined to include "all black children enrolled in the DCSS and their parents or legal guardians."

IT IS SO ORDERED this 19th day of December, 1990.

WILLIAM C. O'KELLEY
Chief United States District Judge